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United States v. Halper: Remedial Justice and Double Jeopardy

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NOTES

United States v. Halper: Remedial Justice and Double Jeopardy

"It may be that the doctrine of double jeopardy is not even a rule of law which is capable of delineation by hard and fast rules without causing injustice to the defendant or creating obstacles for those branches of government charged with the enforcement of the criminal law."[1] Exactly this lack of hard and fast rules concerning double jeopardy forces courts to continue to struggle with the issue today. Although often considered a "prohibition against a second prosecution after a first trial for the same offense,"[2] the double jeopardy clause of the fifth amendment also encompasses a prohibition against multiple punishments.[3] The multiple punishment aspect of double jeopardy is especially important in the context of the increasing incidence of prosecutions for white collar crime.[4] In particular, the double jeopardy clause plays a significant role in health care fraud prosecutions, which have expanded rapidly in the last decade.[5] Because health care fraud has a severe impact on two important federal aid programs, Medicaid and Medicare, the government has sought to impose harsh penalties against providers convicted of fraud to deter this type of activity. As with most forms of white collar crime, the penalty process includes both criminal prosecutions[6] and civil suits to recover damages.[7] While not all cases of white collar

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1. J. SIGLER, DOUBLE JEOPARDY vi (1969). The double jeopardy clause of the fifth amendment provides that: "[No] person [shall] be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. For a general discussion of double jeopardy, see *infra* notes 41-49 and accompanying text. *See generally* J. SIGLER, *supra* (discussing history of the double jeopardy clause and state and federal policy regarding this issue).

2. BLACK'S LAW DICTIONARY 440 (5th ed. 1979) ("The evil sought to be avoided is double trial and double conviction, not necessarily double punishment.").

3. *See* North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

4. The multiple punishment prong of double jeopardy is important with respect to white collar crime because these crimes frequently carry both civil and criminal sanctions. *See* Note, *Parallel Civil and Criminal Proceedings*, 24 AM. CRIM. L. REV. 855 (1987). The term "white collar crime" was coined by Edwin Sutherland and defined as "a crime committed by a person of respectability and high social status in the course of his occupation." E. SUTHERLAND, WHITE COLLAR CRIME: THE UNCUT VERSION 7 (1983). More recently, this problem has been described as " 'nonviolent crime for financial gain committed by means of deception by persons . . . having professional status or specialized technical skills.' " BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, SPECIAL REPORT ON WHITE COLLAR CRIME 1 (1987) (quoting BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, DICTIONARY OF CRIMINAL JUSTICE DATA TERMINOLOGY 215 (2d ed. 1981)).

5. Between 1979 and 1986 fraud convictions of health care providers increased almost 234%. Bucy, *Fraud by Fright: White Collar Crime by Health Care Providers*, 67 N.C.L. REV. 855, 870 (1989). For a general discussion of fraud by health care providers as white collar crime, see *id.* at 870-82.

6. Criminal prosecutions for health care fraud take many different forms. The government may bring these prosecutions under a variety of theories including mail fraud, false statements, false claims, conspiracy to defraud the government, and Medicaid and Medicare fraud. *See, e.g.*, United States v. Campbell, 845 F.2d 1374 (6th Cir.) (mail fraud and false claims), *cert. denied*, 109 S. Ct. 259 (1988); United States v. Larm, 824 F.2d 780 (9th Cir. 1987) (Medicaid fraud), *cert. denied*, 484 U.S. 1078 (1988); United States v. Greber, 760 F.2d 68 (3d Cir.) (mail fraud, Medicare fraud, false statements), *cert. denied*, 474 U.S. 988 (1985); United States v. Jones, 587 F.2d 802 (5th Cir. 1979) (per curiam) (conspiracy to defraud the government).

crime or health care fraud involve both types of proceedings, cases that do may present a significant constitutional issue concerning the fifth amendment's prohibition against double jeopardy.[8] In the usual case in which the government institutes both criminal and civil proceedings, the issue of double jeopardy will not arise because the government has a clearly established right to impose criminal punishment and to extract civil damages from a defendant for a single illegal act.[9] In an occasional case, however, when a defendant already has been prosecuted criminally, the subsequent civil forfeitures sought by the government may be so excessive in relation to the government's damages as to act as a second punishment. In this situation, the United States Supreme Court recently held in *United States v. Halper*, the double jeopardy clause will preclude imposing civil penalties that serve a punitive purpose.[10]

This Note will examine the nature of the double jeopardy protection as it applies to both criminal actions and actions brought under the False Claims Act.[11] Particularly, the Note will focus on the multiple punishment aspect of double jeopardy and the courts' failure in earlier cases to take into account the possibility that, under certain circumstances, civil penalties can serve punitive ends.[12] Finally, the Note will analyze the progression from a strict focus on statutory construction and congressional intent to an examination of how the penalty affects the defendant.[13] The Note concludes that, although the *Halper* Court made the only constitutionally sound decision on the facts before it and introduced the possibility of finding a double jeopardy violation in a civil penalty, it did not lay the controversy to rest. New problems will arise in drawing the line between remedy and punishment, and although the *Halper* Court established a framework for solving these problems, it was unable to develop a rule that would ensure more consistent application of this protection.

Irwin Halper was the manager of New City Medical Laboratories, Inc., a medical service company in New York City. In this capacity he rendered medical services to Medicare patients[14] in private homes, nursing homes, and skilled nursing facilities.[15] As a Medicare provider,[16] Halper had been instructed to bill

7. Civil remedies include actions under the False Claims Act, 31 U.S.C. § 3729 (1982 & Supp. V 1987), and the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7(a) (1982 & Supp. V 1987), administrative actions by the Department of Health and Human Services or by states to terminate provider participation in the Medicaid or Medicare programs, and suspension of Medicare and Medicaid payments. Bucy, *supra* note 5, at 873-74.

8. *See supra* note 1.

9. *See, e.g.*, Helvering v. Mitchell, 303 U.S. 391, 399 (1938) ("Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.").

10. 109 S. Ct. 1892, 1902 (1989).

11. *See infra* notes 41-61 and accompanying text.

12. *See infra* notes 62-88 and accompanying text.

13. *See infra* notes 89-110 and accompanying text.

14. *Halper*, 109 S. Ct. at 1895.

15. United States v. Halper, 660 F. Supp. 531, 532 (S.D.N.Y.), *amended on reargument*, 664 F. Supp. 852 (S.D.N.Y. 1987), *vacated*, 109 S. Ct. 1892 (1989). " '[S]killed nursing facility' means an institution . . . which—(1) is primarily engaged in providing to residents—(A) skilled nursing care and related services for residents who require medical or nursing care, or (B) rehabilitation services

for his services according to a particular procedure code corresponding to the type of service provided, as specified by Blue Cross and Blue Shield of Greater New York.[17] Blue Cross, as a fiscal intermediary[18] for the United States Department of Health and Human Services, then would pass these costs on to the United States government.[19]

Between January 1982 and December 1983, Halper submitted sixty-five claim forms that misrepresented the services he had provided.[20] Consequently, the government, through Medicare, overpaid Halper $585.[21] As a result of these fraudulent claims, on July 9, 1985, Halper was convicted of sixty-five counts of violating the criminal False Claims Act,[22] sentenced to two years in prison and given a $5,000 fine.[23] The government then brought action in the United States District Court for the Southern District of New York under the

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for the rehabilitation of injured, disabled, or sick persons . . . ." 42 U.S.C. § 1395i-3(a) (Supp. V 1987).

16. The Medicare statute defines provider as "a hospital, skilled nursing facility, comprehensive outpatient rehabilitation facility, home health agency, [or] hospice program." 42 U.S.C. § 1395x(u) (Supp. V 1987).

17. United States v. Halper, 660 F. Supp. 531, 532 (S.D.N.Y.), *amended on reargument*, 664 F. Supp. 852 (S.D.N.Y. 1987), *vacated*, 109 S. Ct. 1892 (1989). The Medicare regulations are codified in the Health Insurance for the Aged Act, 42 U.S.C. § 1395-95xx (1982 & Supp. V 1987). The supplemental insurance program under which Halper sought reimbursement, commonly known as Medicare Part B, is codified at 42 U.S.C. § 1395j (1982 & Supp. V 1987). Under this program, Blue Cross supplied each provider with a manual that listed Medicare procedure codes, explained how the codes were used, and specified the amount to be billed for services rendered under each particular code. United States v. Halper, 660 F. Supp. 531, 532 (S.D.N.Y.), *amended on reargument*, 664 F. Supp. 852 (S.D.N.Y. 1987), *vacated*, 109 S. Ct. 1892 (1989).

18. The Medicare system is administered through intermediaries whose primary functions include:

A. Determining the amount of hospital insurance benefits payable to providers based on reasonable cost; and

B. Paying hospital insurance benefits-receiving, disbursing, and accounting for funds advanced by the federal government; and

C. Assisting providers to establish and maintain necessary financial records; and

D. Serving as a channel for the communication of information relating to the hospital insurance plan; and

E. Auditing the records of providers as necessary to insure proper payment of hospital insurance benefits . . . .

H. MCCORMICK, MEDICARE AND MEDICAID CLAIMS AND PROCEDURES § 12, at 23 (1986).

19. *Halper*, 109 S. Ct. at 1896.

20. *Id.*

21. *Id.* There were two possible procedure codes for the services Halper rendered. Halper should have used the 9018 code, providing $10.00 or $12.00 reimbursement for the first or only patient seen in a single day at a private home, nursing home, or skilled nursing facility. For services provided to each additional patient on the same day at the same facility, Halper should have used the 9019 code, reimbursable at $3.00. Halper's fraud consisted of sixty-five billings of subsequent patients at the same facility under the 9018 code when they should have been billed at the 9019 code. United States v. Halper, 660 F. Supp. 531, 532 (S.D.N.Y.), *amended on reargument*, 664 F. Supp. 852 (S.D.N.Y. 1987), *vacated*, 109 S. Ct. 1892 (1989).

22. 18 U.S.C. § 287 (Supp. V 1987). At the time of Halper's conviction, the False Claims Act provided that "[w]hoever makes or presents to . . . the United States, or to any department or agency thereof, any claim . . . knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both." 18 U.S.C. § 287 (1982). The statute currently provides for imprisonment for not more than five years and a maximum fine of $1,000,000. 18 U.S.C. § 287 (Supp. V 1987).

23. United States v. Halper, 660 F. Supp. 531, 532 (S.D.N.Y.), *amended on reargument*, 664 F. Supp. 852 (S.D.N.Y. 1987), *vacated*, 109 S. Ct. 1892 (1989).

civil False Claims Act, which provides for double damages plus a $2,000-per-count penalty for each false claim filed for reimbursement by the government.[24] Applying the doctrine of collateral estoppel, the court granted the government summary judgment based on the facts established in Halper's criminal trial.[25] To determine the penalty, the court interpreted the $2,000 per count penalty to be discretionary. Approximating the damages sustained, the court held that a fine of $16,000 would reasonably compensate the government and allowed the statutory penalty of $2,000 for eight of the sixty-five claims.[26]

The government moved for reargument[27] and amendment of the judgment to recover the statutory penalty for all counts.[28] On reargument, the court agreed with the government that the $2,000 penalty was mandatory for each false claim and admitted error in evaluating the statute as discretionary.[29] However, in light of Halper's prior criminal conviction and the harshness of a $130,000 penalty for $585 damages, the court held that imposing such a penalty would be tantamount to second punishment and therefore would violate Halper's constitutional rights under the double jeopardy clause.[30] On this rationale the district court refused to impose the per count penalty and allowed only the statutory double damages.[31]

To resolve the question whether a $130,000 penalty against Halper would violate the double jeopardy clause, the United States took a direct appeal to the Supreme Court.[32] Restricting its decision to the facts of the case, the Court held that it is possible for a civil penalty to act as punishment and implicate the double jeopardy clause. The Court stated that it is more important to look at the effect of the penalty than the way it is labeled.[33] Relying on this rationale, the Court established the rule that when the subsequent civil penalty bears no relation to the actual damages sustained and seems to act as punishment, the defendant is entitled to an accounting of the government's actual costs to deter-

24. *Halper*, 109 S. Ct. at 1896. The civil False Claims Act appears at 31 U.S.C. §§ 3729-3731 (1982). For a discussion of the history of the False Claims Act, see *infra* notes 54-56 and accompanying text. For a discussion of the current version of this statute, see *infra* text accompanying note 123.

25. United States v. Halper, 660 F. Supp. 531, 531 (S.D.N.Y.), *amended on reargument*, 664 F. Supp. 852 (S.D.N.Y. 1987), *vacated*, 109 S. Ct. 1892 (1989); *see* C. WRIGHT, THE LAW OF FEDERAL COURTS 682-88 (1983) (discussing collateral estoppel); *see also* Comment, *Implications of the 1984 Insider Trading Sanction Act: Collateral Estoppel and Double Jeopardy*, 64 N.C.L. REV. 117, 129-42 (1985) (discussing application of collateral estoppel to similar proceedings brought under the 1984 Insider Trading Sanction Act).

26. United States v. Halper, 660 F. Supp. 531, 534 (S.D.N.Y.), *amended on reargument*, 664 F. Supp. 852 (S.D.N.Y. 1987), *vacated*, 109 S. Ct. 1892 (1989).

27. United States v. Halper, 664 F. Supp. 852, 853 (S.D.N.Y. 1987), *vacated*, 109 S. Ct. 1892 (1989).

28. *Id.* The motion for amendment of the judgment was made pursuant to rule 59(e) of the Federal Rules of Civil Procedure.

29. *Halper*, 664 F. Supp. at 854.

30. *Id.*

31. *Id.* at 855.

32. *Halper*, 109 S. Ct. at 1897. "Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action . . . ." 28 U.S.C. § 1252 (1982).

33. *Halper*, 109 S. Ct. at 1901.

mine the nature of the penalty.[34] The Court then affirmed the district court's holding that a $130,000 fine would violate the double jeopardy clause.[35] The Court noted, however, that the government had not received the opportunity to litigate its actual damages. Following its rule, the Court remanded the case to allow the government to present the district court with an accounting of its actual costs.[36] In this way, the district court could ensure that the relationship between the damages sustained and the $130,000 penalty actually was so disproportionate as to implicate the constitutional protection against double jeopardy.[37]

Justice Blackmun, writing for a unanimous Court, announced the holding as "one of reason," but was careful to note that it constituted "a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused."[38] While asserting that "the Government is entitled to rough remedial justice," Justice Blackmun recognized that remedial justice should not come at the expense of individual constitutional rights.[39] In order to balance the competing interests of compensating the government and protecting the defendant's right to be free from multiple punishments, the *Halper* Court placed responsibility on the trial court to request an accounting of the government's damages and to use that information to decide when a civil remedy is so excessive as to constitute punishment.[40]

The *Halper* Court's opinion takes an important step in the development of double jeopardy protection as it is applied in cases involving multiple punishments. Although the protection against double jeopardy is a well-established constitutional principle,[41] it has complex and sometimes confusing applications.

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34. *Id.* at 1902.

35. *Id.* at 1904.

36. *Id.* at 1903-04.

37. *Id.* at 1904.

38. *Id.* at 1902.

39. *Id.* at 1900 (The government "may demand compensation according to somewhat imprecise formulas . . . without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis.").

40. *Id.* at 1902. In a concurring opinion, Justice Kennedy emphasized the narrow scope of the holding and stressed the importance of examining the particular facts of each case. He also instructed courts not to take the holding as an invitation to evaluate the substantive purposes of every judicial proceeding, stating that the holding "does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding." *Id.* at 1904 (Kennedy, J., concurring). Finally, he noted that there are objective factors that clarify the distinction between remedy and punishment and aid resolution of the double jeopardy issue. *Id.* (Kennedy, J., concurring). Justice Kennedy relied on Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), which listed seven objective factors useful in determining whether a statute is remedial or punitive. These factors are:

> whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Id. at 168-69 (footnotes omitted).

41. The principle of double jeopardy was first articulated in 1873 in *Ex parte* Lange, 85 U.S. (18

In *North Carolina v. Pearce*[42] the Supreme Court enumerated three separate protections embodied in the double jeopardy clause. This clause protects against a second prosecution for the same offense after the defendant is once acquitted.[43] It also provides the same protection if the defendant is once convicted.[44] Finally, it protects against multiple punishments for the same offense.[45]

The proscription against multiple punishments for the same offense may arise in two distinct contexts.[46] The issue may arise in double-description cases in which a single offense is punishable under more than one statute.[47] Multiple punishment problems also may arise in unit-of-prosecution cases in which the particular criminal conduct is fragmented so that a single course of conduct constitutes several violations of the statute.[48] In either of these contexts, the multiple sentences may exceed the statutorily authorized sanction for the crime, thereby acting as a second punishment and implicating the double jeopardy clause.[49]

Wall.) 163, 168 (1873) ("If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence [sic].").

42. 395 U.S. 711 (1969).

43. *Id.* at 717; *see, e.g.*, United States v. Ball, 163 U.S. 662 (1896) (acquittal in murder prosecution barred second indictment for same killing).

44. *Pearce*, 395 U.S. at 717; *see, e.g.*, *In re* Nielsen, 131 U.S. 176 (1889) (conviction for unlawful cohabitation barred subsequent adultery indictment).

45. *Pearce*, 395 U.S. at 717.

46. Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 111.

47. For an example of a double-description case, see Gore v. United States, 357 U.S. 386, 389 (1958). The majority in *Gore* rejected the defendant's double jeopardy defense. *Id.* at 392-93 (5-4 decision). Justice Douglas's dissent in *Gore* questioned the validity of this holding, however. *Id.* at 395 (Douglas, J., dissenting) ("Plainly, Congress defined three distinct crimes, giving the prosecutor on these facts a choice. But I do not think the courts were warranted in punishing petitioner three times for the same transaction."). Questions of multiple punishments may be resolved by the rule of lenity:

> when Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity . . . . It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. This in no wise implies that language used in criminal statutes should not be read with the saving grace of common sense with which other enactments, not cast in technical language, are to be read.

Bell v. United States, 349 U.S. 81, 83 (1955).

48. Westen & Drubel, *supra* note 46, at 111-12; *see, e.g.*, *Bell*, 349 U.S. at 83 (holding transportation of two women across state lines for the purpose of prostitution as a single violation of the Mann Act, rather than as two units).

49. There are several common situations, however, in which defendants erroneously attempt to invoke the protections of the double jeopardy clause under a multiple punishment theory. The first of these situations involves punishments by separate sovereigns. Although the fifth amendment forbids second prosecutions and multiple punishments by a single governmental entity, it does not apply when a state brings one prosecution and the federal government brings another. *See, e.g.*, United States v. Lanza, 260 U.S. 377, 382 (1922) ("We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other."); Chapman v. United States Dep't of Health & Human Servs., 821 F.2d 523 (10th Cir. 1987) ("The double jeopardy clause does not prohibit the federal government from imposing criminal sanctions following state criminal sanctions since both the state and federal governments have the power, inherent in any sovereign, to independently define and punish an offense."); *see also* J. SIGLER, *supra* note 1, at 57 (noting the power of separate sovereigns to punish the same criminal activity).

Double jeopardy also does not apply when a court imposes two types of punishments in a single

Although it clearly falls into the multiple punishment prong of double jeopardy, a case in which the court imposes both civil and criminal sanctions for one illegal activity does not fit into this particular multiple punishment analysis. A dual sanction[50] case is not a double-description case because it is not necessarily punishable under two criminal statutes.[51] Nor does a dual sanction come under the unit-of-prosecution heading because the number of counts is not necessarily an issue.[52] However, a dual sanction case does involve two proceedings by the same governmental entity for the same course of conduct. Nonetheless, double jeopardy usually does not apply to such a case because the civil proceeding is intended to serve a remedial, not a punitive purpose.[53]

Halper established, however, that a dual sanction case may violate double jeopardy in some circumstances. The controlling civil statute in *Halper* and many other cases of fraud against the government is the False Claims Act.[54] Congress originally enacted this statute in 1863 to prevent individuals from billing the government for nonexistent or worthless goods or for necessities at excessive prices.[55] The purpose of the statute was to protect the public treasury from false and fraudulent claims.[56] Fraud always raises the possibility of two lawsuits—a criminal action brought by the government and a civil action brought by the defrauded party. By expressly empowering the government to pursue both these avenues in cases in which it is the defrauded party, the False Claims Act has inherent potential to create a dual sanction form of double jeopardy problem.

The double jeopardy problem that arises in cases such as *Halper* results from several aspects of the False Claims Act. The first of these characteristics is the mandatory nature of the per count penalty under the civil False Claims Act,

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judicial proceeding. A single proceeding can ensure that the penalty imposed does not exceed the penalty intended by Congress. *See, e.g.*, United States v. Killough, 848 F.2d 1523, 1534 (11th Cir. 1988) ("Only where a defendant is subjected to successive actions, both authorizing punishment the purpose of which is to vindicate public justice, is the defendant placed in 'jeopardy' within the constitutional construction.").

Finally, double jeopardy does not apply when there is a civil-criminal split in the nature of the two punishments the court imposes, assuming the civil penalty retains its remedial nature and does not cross the line between remedy and punishment.

50. This Note will use the phrase "dual sanction" to describe a case in which the court imposes both civil and criminal sanctions for one illegal activity. Dual sanction cases must fall into the multiple punishment prong of the inquiry because the other two prongs address subsequent criminal prosecutions following acquittal or conviction. *See supra* text accompanying notes 42-45.

51. *See* Westen & Drubel, *supra* note 46, at 111-13.

52. The number of counts may be an issue because the punitive effect of the penalty increases exponentially when a set penalty is imposed for each of a large number of counts. This is not equivalent to the effect of the number of counts in a unit-of-prosecution case, however, when the mere fact of punishing more than once for a single course of conduct is sufficient to invoke double jeopardy. *See supra* note 48.

53. *See* Rex Trailer Co. v. United States, 350 U.S. 148, 150 (1956); Helvering v. Mitchell, 303 U.S. 391, 399 (1938).

54. Ch. 67, 12 Stat. 696 (codified as amended at 31 U.S.C. §§ 3729-3731 (1982 & Supp. V 1987)).

55. *See* United States v. Silver, 384 F. Supp. 617, 619 (E.D.N.Y. 1974).

56. *Id.* The Act's original provisions for both criminal and civil penalties were altered in 1948 and reenacted in different sections of the United States Code. *Id.* The criminal False Claims Act is currently codified at 18 U.S.C. § 287 (1982 & Supp. V 1987) and the civil False Claims Act is currently codified at 31 U.S.C. § 3729 (1982 & Supp. V 1987).

which does not allow the court to examine whether the recovery so exceeds the damages as to act as punishment.[57] The provisions of this Act at the time of Halper's conviction allowed the government to recover a civil penalty of $2,000 per false claim plus double damages.[58] Courts generally have held that the $2,000 penalty is mandatory for all counts.[59] The second characteristic of the False Claims Act that gives rise to a potential double jeopardy problem is that the government does not have to prove actual damages to recover the mandatory forfeitures.[60] Finally, even when the government is able to prove damages, the penalty imposed does not need to bear a rational relation to those damages when there has been no prior criminal action.[61]

Although these characteristics of the False Claims Act indicate that it may serve a punitive purpose, they do not mean that the penalty necessarily creates

57. The double jeopardy defense is often rejected based on the remedial nature of the fine imposed under the civil False Claims Act. *See supra* note 53; *see also* United States v. Ward, 448 U.S. 242, 250-51 (1980) (The Court was not "persuaded by any of respondent's . . . arguments that he has offered the 'clearest proof' that the penalty here in question is punitive in either purpose or effect."); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 236-37 (1972) (holding forfeiture under Tariff Act civil remedy, not criminal penalty); Berdick v. United States, 612 F.2d 533, 538 (Ct. Cl. 1979) ("[T]he forfeitures required by the False Claims Act are civil, not criminal, and the double jeopardy provisions of the Fifth Amendment do not apply to civil contexts.").

58. *Id.* The penalty set out in 31 U.S.C. § 3729 is a per count penalty. *See, e.g.*, United States v. Hill, 676 F. Supp. 1158, 1182 (N.D. Fla. 1987) (holding that the penalty applies to each violation of the Act). See *infra* text accompanying note 123 for a discussion of the current provisions of this statute.

59. *See, e.g.*, United States v. Bornstein, 423 U.S. 303, 309 (1976) ("It is settled that the Act permits recovery of multiple forfeitures . . . ."); United States v. McLeod, 721 F.2d 282, 285 (9th Cir. 1983) ("A person who commits any of the acts prohibited by the False Claims Act is liable for a $2,000 civil penalty *for each false claim presented* . . . .") (emphasis added); United States v. Halper, 664 F. Supp. 852, 854 (S.D.N.Y. 1987) ("[T]he imposition of $2,000 for each of the sixty-five false claims is mandatory."), *vacated*, 109 S. Ct. 1892 (1989); United States *ex rel.* Fahner v. Alaska, 591 F. Supp. 794, 800 (N.D. Ill. 1984) (mem.) ("It is well-established that [the False Claims Act] provides for a $2,000 forfeiture for *each* false claim submitted by a defendant."). *But see* Peterson v. Richardson, 370 F. Supp. 1259, 1267 (N.D. Tex. 1973) (mem.) (court imposed less than the full $2,000 per count penalty reasoning that the purpose of the penalty "is to reasonably indemnify the government for all losses arising from the false claims."), *aff'd sub nom.* Peterson v. Weinberger, 508 F.2d 45 (5th Cir.), *cert. denied*, 423 U.S. 830 (1975); *cf.* United States v. Greenberg, 237 F. Supp. 439, 445 (S.D.N.Y. 1965) (number of *counts* was read as discretionary, although there was still a mandatory penalty for each count charged).

60. In Fleming v. United States, 336 F.2d 475 (10th Cir. 1964), the court found the defendant guilty of submitting 15 false purchase orders under the Emergency Feed Program in violation of the False Claims Act. Although the government could prove damages for only one of these false purchase orders, the court allowed recovery for all 15 based on the theory that proof of damages is not an essential aspect of recovery under the Act. *Id.* at 480 ("[U]pon adequate proof of the making of a claim upon the Government, knowing it to be false, the United States is entitled, without proof of damage, to recover the forfeiture."); *see also* United States v. Tieger, 234 F.2d 589, 590 n.4 (3d Cir.) ("This court has recognized that a false claim may be actionable though in the given case the government has not been injured by its assertion."), *cert. denied*, 352 U.S. 941 (1956).

61. *See* United States *ex rel.* Fahner v. Alaska, 591 F. Supp. 794 (N.D. Ill. 1984) (mem.). In this case, the court found an optometrist guilty of 551 counts of charging Medicaid for optometric services which he had not rendered. As a result of this fraud, the State of Illinois paid defendant over $19,000 out of appropriations from the federal government. The district court, imposing a penalty of over $1,100,000, held that "[w]hile the total damage award in this action may appear to be excessive," it was justified and proper under the mandates of the False Claims Act. *Id.* at 801-02. The court sought to justify its holding by stressing the great need to prevent this type of conduct by individuals with the right and responsibility to administer a program designed to serve the medical needs of the indigent population. "The pattern of egregious conduct presented here is precisely the type that impairs the integrity of these programs and precludes their successful operation." *Id.* at 801.

double jeopardy. In determining whether penalties under the Act bear upon a double jeopardy issue, most courts have focused on the nature of the penalty, finding this to be dispositive.[62] In *Helvering v. Mitchell*[63] defendant was acquitted of income tax fraud.[64] The Commissioner of Internal Revenue subsequently asserted a deficiency judgment for over $728,000 with a corresponding fifty percent tax fraud assessment of over $364,000.[65] Mitchell defended against the deficiency judgment on the ground that the nature of the fraud assessment was punitive because it was intended not as a tax, but as punishment for alleged fraud.[66] Mitchell argued that if it acted as punishment, the fifty percent addition to the tax would violate the double jeopardy prohibition against a second prosecution following acquittal. The United States Supreme Court reasoned that "[u]nless this sanction was intended as punishment, so that the *proceeding is essentially criminal*, the double jeopardy clause . . . is not applicable."[67] The Court then relied on the purported character of the sanction as manifested in its purpose, procedural application, and position in the statute to find the fifty percent tax to be a remedial rather than punitive sanction.[68] The Court determined that the sanction had a remedial character because its primary purpose was to indemnify the government against loss and to act "as a safeguard for the protection of the revenue."[69] The Court also reasoned that the assessment was not criminal because the statute allowed for collection of the assessment by distraint and collection of a criminal sanction by distraint is unconstitutional.[70] Finally, the statute contained two "separate and distinct provisions imposing sanctions," which appeared at different places in the statute—the criminal sanction of fine and imprisonment under the heading "Penalties" and the sanction of a fifty percent fraud assessment under the heading "Additions to the Tax." This statutory arrangement confirmed the legislative intent that the sanction serve a remedial, not a punitive, function.[71]

The Court in *United States ex rel. Marcus v. Hess*[72] also focused on the nature of the statute before it. *Hess* dealt with collusive bidding by electrical contractors on Public Works Administration projects in Pittsburgh. After pleading nolo contendere, defendants were convicted of conspiracy to defraud the government[73] and were fined $54,000.[74] Subsequently, a private individual

62. *See supra* note 57.

63. 303 U.S. 391 (1938).

64. *Id.* at 396.

65. *Id.* at 395. The Court rejected Mitchell's res judicata defense based on the lower burden of proof in civil cases. *Id.* at 397-98.

66. *Id.* at 398.

67. *Id.* at 398-99 (emphasis added).

68. *Id.* at 398-406.

69. *Id.* at 401.

70. *Id.* at 401-02. Distraint is defined as "[s]eizure; the act of distraining or making a distress." BLACK'S LAW DICTIONARY 426 (5th ed. 1979). Because collection by distraint does not require notice or a hearing, it would violate the criminal defendant's rights to due process and to be free from unreasonable searches. *See* U.S. CONST. amends. IV & V.

71. *Mitchell*, 303 U.S. at 404-05.

72. 317 U.S. 537 (1943).

73. *Id.* at 548.

brought a *qui tam* action[75] to collect civil forfeitures as compensation for damages suffered by the government as a result of the fraud. Defendants contended that in light of their prior criminal conviction and punishment, double jeopardy should bar such a proceeding.[76] Looking at the nature of the penalty in the *qui tam* suit, the Court held that double jeopardy did not apply because the sanctions were remedial, not punitive, and would not "do more than afford the government complete indemnity for the injuries done it."[77] Writing for the majority, Justice Black reasoned that the purpose of the statute was restitution and that the government has a right, as a party to a contract, to have "the same interest in protecting itself from fraudulent practices as it has in protecting any citizen from frauds which may be practiced upon him."[78] Furthermore, the Court noted without explanation that the precise amount of damages suffered does not control the government's recovery, especially in a case in which half the double damages award goes to the party bringing the suit on behalf of the government.[79]

Justice Frankfurter, concurring in judgment, took issue with the majority's reliance on "dialectical subtleties."[80] Recognizing that "[p]unitive ends may be pursued in civil proceedings,"[81] Justice Frankfurter argued that the Court should not reject the plea of double jeopardy because the sanction serves "remedial" ends, but because the subsequent civil suit merely rounds out the full realm of sanctions intended by Congress, which the Court easily could have imposed in a unitary proceeding.[82]

In *Rex Trailer Co. v. United States*[83] the Supreme Court found that civil forfeitures under the Surplus Property Act of 1944[84] served only remedial purposes even when the government was unable to prove specific monetary dam-

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74. *Id.* at 545.

75. *Qui tam* actions are suits brought by private parties in the name of and for the benefit of the government. The person bringing the action, sometimes called the informer, is entitled to a percentage of the award. *See* 31 U.S.C. § 3730(b), (c) & (d) (1982 & Supp. V 1987).

76. *Hess*, 317 U.S. at 548.

77. *Id.* at 549.

78. *Id.* at 550. "It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection." *Id.* (citing Cotton v. United States, 52 U.S. (11 How.) 229, 231 (1850)).

79. *Id.*

80. *Id.* at 554 (Frankfurter, J., concurring). Justice Frankfurter contended:

> The argument seems to run thus: Double jeopardy means attempting to punish criminally twice; this is not an attempt to punish criminally because it is a civil proceeding; it is a civil proceeding because, as a matter of "statutory construction," it is a "civil sanction" which is being enforced here; and the sanction is "civil" because it is "remedial" and not "punitive" in nature.

Id. at 553 (Frankfurter, J., concurring).

81. *Id.* at 554 (Frankfurter, J., concurring).

82. *Id.* at 555 (Frankfurter, J., concurring). Justice Frankfurter asserted that his view had a historical basis because "[i]t would do violence to proper regard for the framers of the Fifth Amendment to assume that they contemporaneously enacted and continued to enact legislation that was offensive to the guarantees of the double jeopardy clause which they had proposed for ratification." *Id.* at 556 (Frankfurter, J., concurring).

83. 350 U.S. 148 (1956).

84. Surplus Property Act of 1944, ch. 479, 58 Stat. 765.

ages.[85] As in *Hess*, the Supreme Court found that the government's interest in having the same contract remedies as private individuals precluded a finding that recovery of statutory "liquidated damages" served a punitive purpose.[86] In support of its holding, the Court pointed to an explicit provision in the statute stating that "[t]he civil remedies provided in this section shall be in addition to all other criminal penalties and civil remedies provided by law."[87] The Court found these civil forfeitures proper, noting that, even though no measurable monetary losses were alleged, the government sustained injury because the sales procured by fraud displaced "bona fide sales to veterans."[88]

A common thread running through these cases is the Court's failure to examine the effect of the penalty. The major focus has been not on how the penalty will affect the defendant, but on formulating a label for the penalty based on what governmental purposes it serves.[89] In each case, the Court has ignored the effect of the penalty from the defendant's perspective and has concluded easily that the penalty imposed was civil because it served the government's remedial ends.

Recently, in *United States v. Ward*,[90] the Court went beyond its traditional focus on the nature of the penalty from the government's point of view and evidenced a willingness to look at the penalty's effect from the perspective of the defendant. The controversy in *Ward* focused on two sections of the Federal Water Pollution Control Act:[91] section 311(b)(5), which provides for a fine or imprisonment for failure of a person in charge of an onshore or offshore oil facility to report to the appropriate agency a spillage of oil or any hazardous substance,[92] and section 311(b)(6), which provides for a civil penalty against the owner of any such oil spilling facility.[93] Defendant, lessor of one such facility, reported a spill in compliance with 311(b)(5). When the Coast Guard assessed a civil penalty against him based on this information, Ward argued that this violated his privilege against compulsory self-incrimination.[94] The Court used a

85. *Rex Trailer Co.*, 350 U.S. at 152-53. The Surplus Property Act provided for three alternative remedies; the first of these was $2,000 plus double damages, a provision identical to that of the False Claims Act. *Id.* at 151.

86. *Id.* at 151.

87. *Id.* at 152.

88. *Id.* at 153.

89. "The sanction of 50 per centum addition . . . was clearly intended as a civil one." Helvering v. Mitchell, 303 U.S. 391, 405 (1938). This penalty is "provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud." *Id.* at 401; *see also* United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 549 (1943) ("It is enough for present purposes if we conclude that the instant proceedings are remedial and impose a civil sanction. . . . We cannot say that the remedy now before us . . . will do more than afford the government complete indemnity for the injuries done it."); *Rex Trailer Co.*, 350 U.S. at 151 ("We conclude that the recovery here is civil in nature. The Government has the right to make contracts and hold and dispense of property, and, for the protection of its property rights, it may resort to the same remedies as a private person.").

90. 448 U.S. 242 (1980).

91. 33 U.S.C. §§ 1251-1387 (1982 & Supp. V 1987).

92. *Ward*, 448 U.S. at 244; 33 U.S.C. § 1321(b)(5) (1982). This was considered the "criminal" part of the statute.

93. *Ward*, 448 U.S. at 245; 33 U.S.C. § 1321(b)(6) (Supp. V 1987).

94. *Ward*, 448 U.S. at 247.

two-step analysis to evaluate Ward's defense. The first level of inquiry was "whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label [remedial or punitive] or the other."[95] Assuming Congress intended the penalty to be remedial, the second level of inquiry was "whether the statutory scheme was so punitive *either in purpose or effect* as to negate that intention."[96] This approach recognizes the need to retain the initial focus on congressional intent. More importantly, however, it recognizes the need to look beyond congressional intent to examine how the penalty affects the defendant. Although the Court ultimately decided that the effect of the civil penalty in the Federal Water Pollution Control Act was not sufficiently punitive to implicate the defendant's right against compulsory self-incrimination,[97] *Ward* did evidence a willingness to look beyond the nature of the penalty toward a more substantive analysis of the effect of the statute as applied in the particular case.

United States v. Halper represents an extension of the second step of the *Ward* analysis into the area of double jeopardy. The *Halper* Court began by looking at the government's argument that a penalty assessed in a civil suit precludes application of the double jeopardy clause under a multiple punishment theory.[98] The government based its argument on the "three principles" established by *Mitchell, Hess,* and *Rex Trailer*: "[F]irst, that the Double Jeopardy Clause's prohibition against multiple punishment protects against only a second criminal penalty; second, that criminal penalties are imposed only in criminal proceedings; and, third, that proceedings under, and penalties authorized by, the civil False Claims Act are civil in nature."[99] Furthermore, the government argued that the nature of the penalty is a matter of statutory construction, and statutory construction is determined by congressional intent.[100] The government's argument paralleled the first level of inquiry under the *Ward* approach by focusing on congressional intent. The basic premise of the government's argument, therefore, was that the penalty was civil, not criminal. The *Halper* Court accepted this premise, but rejected the assertion that such a penalty, by its own definition, could not act in a punitive manner.[101] Furthermore, the *Halper* Court recognized that the government's argument neglected the critical second step in the *Ward* analysis by failing to examine the effect of the penalty on Halper's constitutional rights.[102]

The *Halper* Court rejected the government's argument and refused to find *Mitchell, Hess,* and *Rex Trailer* dispositive of the facts presented by Halper's

95. *Id.* at 248.

96. *Id.* at 248-49 (emphasis added).

97. *Id.* at 249 ("[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground.") (citing Fleming v. Nestor, 363 U.S. 603, 617 (1960)).

98. *Halper,* 109 S. Ct. at 1898.

99. *Id.*

100. *Id.* "Congress clearly intended the proceedings and penalty at issue here to be civil in nature." *Id.*

101. *Id.*

102. *Id.* ("[I]n a particular case a civil penalty authorized by the Act may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment.").

claim.[103] Instead, the Court found them relevant only in that they establish the government's entitlement to "rough remedial justice."[104] In addition, the Court emphasized a crucial factual distinction between these three precedential cases and *Halper*—the three past cases had not addressed a situation in which the trial court imposed a penalty far in excess of the actual damages.[105]

After dismissing the government's supporting cases as stopping one step short of the *Halper* facts, the Court went on to ask the question now squarely presented by *Halper*: "[U]nder what circumstances [might] a civil penalty . . . constitute punishment for the purpose of the Double Jeopardy Clause[?]"[106] To answer this question, the Court took the additional step that it had not taken in the earlier cases: it looked at the effect of the penalty on the defendant.[107] This step involved not only rejecting the notion that the labels "civil" and "criminal" are controlling,[108] but, more importantly, identifying the goals of punishment and ensuring that the civil penalty did not serve these goals.[109] Under the *Halper* Court's theory, a civil sanction that serves the goals of deterrence and retribution is punishment and, when imposed following a criminal prosecution, establishes double jeopardy.[110]

The Court recognized the difficulty in determining the "precise dollar figure" at which a civil sanction begins serving punitive ends but tried to preclude difficulties in application by stating that in the usual case "fixed-penalty-plus-double-damages provisions can be said to do no more than make the Government whole."[111] In a case in which the civil sanction appears to serve punitive ends, however, the Court left the responsibility to the trial court to take an accounting of the government's actual damages and use this accounting to determine "the size of the civil sanction the Government may receive without crossing the line between remedy and punishment."[112] The Court then posited its rule "that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the

103. The Court rejected *Mitchell* as being "at most . . . of tangential significance for our current inquiry. . . . [I]t simply does not address the question we face today: whether a civil sanction, in application, may be so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis." *Id.* at 1899. The *Halper* Court found *Hess* not to be dispositive because in *Hess* "the Court simply did not face the stark situation presently before us where the recovery is exponentially greater than the amount of the fraud." *Id.* at 1900. Finally, the Court rejected *Rex Trailer* because when the amount of the penalty was $10,000 for an undetermined amount of damages, it could not be found that the defendants had "been subjected to a 'measure of recovery . . . so unreasonable or excessive' as to constitute a second criminal punishment in violation of double jeopardy." *Id.* (quoting Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956)).

104. *Halper*, 109 S. Ct. at 1900.

105. *Id.* at 1900-01.

106. *Id.* at 1901.

107. *Id.* The Court noted that "[t]his constitutional protection is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state." *Id.*

108. *Id.* ("In making this assessment, the labels 'criminal' and 'civil' are not of paramount importance.").

109. *Id.* at 1902.

110. *Id.*

111. *Id.*

112. *Id.*

same conduct and receive a judgment that is not rationally related to the goal of making the Government whole."[113]

The *Halper* Court correctly rejected the government's argument based on *Mitchell*, *Hess*, and *Rex Trailer*, but for the wrong reasons. The *Halper* Court should have rejected the government's reliance on these cases, not because they were factually dissimilar to Halper's claim, but because they failed to address a critical facet of the double jeopardy analysis, the effect of the penalty on the defendant, and rested only on semantic distinctions between "civil" and "criminal" guided by statutory construction.[114]

Halper moved beyond the semantic rationales adopted in those three cases and effectively applied the *Ward* approach. The Court agreed that reliance on statutory language and structure is appropriate to determine the inherent nature of a proceeding, but recognized that this "approach is not well suited to the context of the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments."[115] In this way, the Court accepted the substantive argument that civil penalties can serve punitive ends when they meet the goals of deterrence and retribution.

An important aspect of the Court's treatment of this issue is that it affirmed one of the inherent justifications for the double jeopardy clause—its protection of individual rights.[116] As a significant constitutional protection, the prohibition against double jeopardy may be undermined by blanket statements about the nature of particular penalties without examining the unique circumstances. By recognizing the "intrinsically personal" nature of this protection, the effect of the Court's decision was to affirm this individual protection and adhere to its just application on a case-by-case basis.[117]

Although the *Halper* Court's holding is constitutionally sound, it presents problems in application, the most obvious of which is the difficulty in identifying the point beyond which a civil forfeiture stops serving remedial purposes and

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113. *Id.* at 1903. This rule would not apply in any case in which the defendant has not been previously punished for the same conduct, nor in any case in which the court imposes the civil and criminal penalties in the same proceeding, nor in any case in which a private party brings the subsequent civil suit. *Id.*

114. The *Hess* Court did acknowledge the importance of this facet by agreeing that "[p]unishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrong-doer is concerned." United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 551 (1943). The *Hess* Court retreated to the traditional analysis, however, by stating that this result "is not enough to label it as a criminal statute." *Id.* Given the opportunity to label the penalty criminal in this particular case, the Court failed to do so and rested instead on the validity of the civil sanction as viewed from the government's perspective.

115. *Halper*, 109 S. Ct. at 1901.

116. "The moral sentiment which double jeopardy exemplifies is the feeling that no man should suffer twice for a single act." J. SIGLER, *supra* note 1, at 35.

117. This individual protection is especially important in cases such as *Halper* in which the convicted defendant is subjected not only to criminal and civil penalties, but also to loss of license and permanent disqualification from the Medicaid and Medicare programs. *See* 42 U.S.C. § 1320a-7(a)(3) & -7(a)(1) (1982 & Supp. V 1987) (allowing, but not requiring, exclusion of providers from Medicare and Medicaid programs for convictions relating to fraud, kickbacks, and other prohibited activities).

begins serving punitive ends.[118] The *Halper* Court found that a forfeiture 222 times greater than the amount of damages was so disproportionate to the harm as to constitute punishment. Other courts examining this issue, however, have held that a lesser penalty, still far in excess of the government's damages, served remedial rather than punitive purposes.[119] There is no objective point at which the nature of the penalty changes. The *Halper* Court indicated that the issue would only arise when a large number of claims is present,[120] but failed to suggest any scheme for determining the nature of the penalty in a particular case.[121]

The problem of determining when the nature of the penalty changes becomes even more complicated in light of the 1986 amendments to the False Claims Act.[122] These amendments increase the statutory penalty from $2,000 per count plus double damages to "not less than $5,000 and not more than $10,000" per count plus triple damages.[123] In a case like *Halper* the new larger penalties will be less likely to correlate rationally to the amount of damages sustained in a particular case and thus will more often have a punitive effect.

The most equitable solution is strict adherence to a case-by-case analysis. The analysis in each case must guard against "civil" penalties serving punitive ends and take into account all penalties the government imposes and all damages it sustains. *Halper* makes important strides in equitable evaluation of the multiple punishment prong of double jeopardy by allowing courts to examine the substance and effect of large civil penalties and by rejecting unquestioning reliance on labels and congressional intent. Instead, the Court focuses on what actually needs to be done to protect defendants' constitutional rights and establishes a general analytical framework that opens up the possibility that a court in a particular case may find that a "civil" penalty is actually punishment. Because of the "intrinsically personal" nature of the double jeopardy protection, however, the Court is left with a necessarily amorphous rule and is able to demand only that the penalty and the damages be "rationally related."[124] While this rule may protect the individual defendant's rights, the Court's statement that "the Government is entitled to rough remedial justice"[125] does not necessarily

118. It is true, as Mr. Justice Holmes said, that "[w]henever the law draws a line there will be cases very near each other on opposite sides." But where the consequences that turn upon the line are enormous, out of all proportion to the differences between the cases lying close to either side, courts are likely to be impelled either to wiggle the line or to keep it fuzzy.

Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 388 (1974).

119. *See* Mayers v. United States Dept. of Health and Human Servs., 806 F.2d 995, 999 (11th Cir. 1986) (holding penalty 72 times greater than the amount of damages to be remedial, but justifying this holding on the ground that "[t]he costs which fraud has placed upon our nation's Medicare and Medicaid programs have been severe . . . . [and] that each fraudulent claim filed exacts an immense toll from society."), *cert. denied*, 484 U.S. 822 (1987).

120. *Halper*, 109 S. Ct. at 1903 n.12.

121. *Id.* at 1902 ("[I]t would be difficult, if not impossible in many cases for a court to determine the precise dollar figure at which a civil sanction has accomplished its remedial purpose of making the Government whole, but beyond which the sanction takes on the quality of punishment.").

122. False Claims Amendments Act of 1986, Pub. L. 99-562, 100 Stat. 3153 (codified at 31 U.S.C. § 3729 (Supp. IV 1986)).

123. 31 U.S.C. § 3729 (Supp. IV 1986).

124. *Halper*, 109 S. Ct. at 1903.

125. *Id.* at 1900.

preclude the situation in which "rough justice becomes clear injustice."[126]

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126. *Id.* at 1901.